

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DOUGLAS C. BRODMERKEL</b>	:	DETERMINATION
	:	DTA NO. 818043
for Revision of Deficiencies or for Refund of New York	:	
State and City Personal Income Taxes under Article 22	:	
of the Tax Law and the New York City Administrative	:	
Code for the Years 1995 and 1997.	:	

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Petitioner, Douglas C. Brodmerkel, 23 Wagon Lane East, Centereach, New York 11720, filed a petition for revision of deficiencies or for refund of personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1995 and 1997.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on June 28, 2001 at 10:30 A.M., with briefs to be submitted by October 25, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared on his own behalf. The Division of Taxation appeared by Barbara Billet, Esq. (Kevin R. Law, Esq., of counsel).

***ISSUE***

Whether petitioner established that the Division of Taxation incorrectly calculated a deficiency in income taxes for the 1995 or 1997 tax years.

***FINDINGS OF FACT***

1. Petitioner, Douglas C. Brodmerkel, submitted a New York State resident income tax return for 1995 (form IT-200). On that return, he checked a box next to the statement: "Married

filing separate return.” He did not provide his spouse's social security number as requested on the form.

2. The Division of Taxation (“Division”) returned the 1995 IT-200 to petitioner with a request that he furnish his spouse's social security number. Among other things, the form states: “Please resubmit your completed return in the enclosed envelope with this notice and any additional schedules or forms requested.” The request for missing information is dated May 23, 1996.

3. Petitioner never resubmitted his 1995 return and did not supply his spouse's social security number. Since the Division returned petitioner's 1995 return to him, it was never filed, and the Division had no record of the return.

4. The Division issued a letter to petitioner, dated February 1, 1999, informing him that the Division did not have a record of having received his 1995 New York State Income Tax Return. He was asked to either send a copy of his filed return or explain why he had not filed a return for 1995. Petitioner returned the letter indicating that he had filed his 1995 return and included the following explanation: “you Issued me a notice of Lein (sic) against Me, stole 50.00 From My account So you can shove it up your . . . Look for the Return in your Files you will Get no help From Me.”

5. On October 8, 1999, the Division issued to petitioner a Statement of Proposed Audit Changes for 1995 asserting a deficiency in income tax of \$2,028.00 plus interest of \$598.94 and penalty of \$507.00 for a total due of \$3,133.94. In the computation section, the Division explained that it had searched its files and been unable to locate petitioner's 1995 return. Petitioner's taxable income was calculated using his Federal adjusted gross income (obtained from the Internal Revenue Service) reduced by the standard New York deduction. He was

informed that tax due would be reduced by any taxes withheld if petitioner provided the Division with a copy of his 1995 wage and tax statements.

6. Petitioner responded to the Statement of Proposed Audit Adjustment by sending a letter to the Division which was received by the Audit Support & Control Section on December 21, 1999. In that letter petitioner made several assertions regarding his tax liabilities. Regarding the Division's request for his wife's social security number, he stated: "I do not put my wife's social security # on my tax return because it is my tax return not my wife's return. I have the right to do this." Regarding the Division's allowance of the standard deduction for individuals, petitioner stated as follows:

As far as the standard deduction is allowed, I should be given the highest deduction. Why should I pay taxes based on my marital status? Does something happen to me when I get married? do I become the sucker of the year? Get real! money is money! it has nothing to do with my marital status-except I spend more! Don't tell me that's the way it is, I would be in the same situation if my wife did not work or only worked and earned a small amount.

Petitioner also claimed that he should be allowed three deductions for his dogs. Finally, he claimed that the Division should not be allowed to calculate interest and penalty until the end of 1999 because it lost his tax return in 1996. Petitioner attached a copy of the Division's Request for Missing Information, a copy of his 1995 W-2 form and a copy of the front of his 1995 return showing markings made by the Division before it returned the form to him. The form shows that he claimed the standard deduction and one dependent exemption when he originally sent in the return.

7. Petitioner's 1995 W-2, Wage and Tax Statement, shows that he received wages of \$35,933.79 from which his employer withheld New York State taxes of \$1,577.21 and New York City taxes of \$161.67.

8. On April 24, 2000, the Division issued to petitioner a Notice of Deficiency of 1995 personal income tax, asserting tax due of \$451.00 plus interest of \$153.68 and penalty of \$112.75 for a total amount due of \$717.43. Petitioner's 1995 tax liability was calculated by allowing petitioner the standard deduction and subtracting taxes withheld by his employer from the total amount of tax due. He was not allowed a dependent deduction.

9. After review of petitioner's 1997 personal income tax return, the Division issued to petitioner a Notice of Deficiency, dated June 5, 2000, asserting New York State income tax due of \$205.00 plus penalty and interest and New York City income tax due of \$110.21 plus penalty and interest. A Statement of Proposed Audit Changes issued to petitioner on March 27, 2000 explains the basis for the assertion of tax. In essence, the Division disallowed three dependent deductions claimed by petitioner and calculated New York City nonresident earnings tax.

10. Prior to hearing, petitioner requested four subpoenas from the Division of Tax Appeals for the following people: Marco Zumbolo, Director of Tax Policy; Michael Urbach, Commissioner of Taxation and Finance; Christina Seifert, Senior Attorney; Eliot Spitzer, New York State Attorney General. Administrative Law Judge Thomas Sacca issued a subpoena for Marco Zumbolo and informed petitioner that service of the subpoena was his responsibility. Judge Sacca refused to issue the other three subpoenas on the ground that petitioner had not shown any connection between those persons and petitioner's tax case.

11. By letter to Assistant Chief Administrative Law Judge Daniel J. Ranalli, dated May 15, 2001, the Division requested that the subpoena issued to Marco Zumbolo be withdrawn. In that letter, the Division stated that Marco Zumbolo had retired from State service and that the Division would not accept service on his behalf. Judge Ranalli denied the Division's request.

12. Petitioner never served Marco Zumbolo with a subpoena, apparently believing that the Division had a responsibility to volunteer someone to appear at hearing in place of Mr. Zumbolo.

### ***SUMMARY OF THE PARTIES' POSITIONS***

13. Petitioner's primary position is that the New York State personal income tax law violates the United States Constitution and the New York State Constitution by causing him, a married person filing a separate return, to pay more tax on his income than is paid by some married persons filing joint returns or by individuals. He contends that this so-called "marriage penalty" is discriminatory against all persons in his position.

14. Petitioner also claims that it is unfair for the State to provide tax deductions to persons with children or other dependents since this results in their paying less tax than childless people. He also believes that the government should not provide deductions for mortgage interest and real estate taxes. Petitioner argues that these deductions amount to a form of social engineering which should be prohibited.

15. Petitioner objects to the fact that Mr. Zumbolo failed to testify at the hearing, although he admits that he never served Mr. Zumbolo with a subpoena.

16. The Division first argues that the Division of Tax Appeals lacks jurisdiction to consider the constitutionality of a taxing statute on its face. If the constitutionality of the law is considered, the Division notes that several Federal courts have held that the so-called "marriage penalty" is constitutional (*see, Rinier v. United States*, 92-2 US Tax Cas ¶ 50,503; *Druker v. Commissioner of Internal Revenue*, 697 F2d 46; *Mapes v. United States*, 576 F2d 896). Similarly, the Division argues that no constitutional violation exists where the State provides deductions for which some taxpayers qualify and others do not.

## **CONCLUSIONS OF LAW**

A. There is no merit to any of petitioner's claims. As the Division notes, the so-called marriage penalty has been held to be constitutional in a number of different Federal tax cases (*see, Rinier v. United States*, 92-2 US Tax Cas ¶ 50,503; *Druker v. Commissioner of Internal Revenue*, 697 F2d 46; *Mapes v. United States*, 576 F2d 896). Petitioner's equal protection claim is bogus. The Legislature is free to provide deductions from tax as it deems appropriate. "Whether and to what extent deductions shall be allowed depends upon legislative grace" (*New Colonial Co. v. Helvering*, 292 US 435, quoted in *Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715, 719). By providing deductions for taxpayers with dependents, the Legislature has created two classes of taxpayers: those with dependents and those without dependents. The Legislature has the authority to create these classes and violates no principle of equal protection when it does so (*see, Matter of Long Island Lighting v. State Tax Commn.*, 45 NY2d 529, 410 NYS2d 561).

B. All of the arguments raised here were raised by petitioner in a prior proceeding and rejected by the Tax Appeals Tribunal (*see, Matter of Brodmerkel*, Tax Appeals Tribunal, August 9, 2001). There, the Tribunal affirmed the Administrative Law Judge determination holding that petitioner's claims amounted to a challenge to the constitutionality of the taxing statutes on their face and that the Division of Tax Appeals has no authority to hear such claims.

C. Since petitioner does not argue that the Division incorrectly calculated his tax liability in accordance with the tax statutes, he has not carried his burden of proof to show that the notices of deficiency issued to him were incorrect (Tax Law § 689[e]).

D. Petitioner never served Mr. Zumbolo with the subpoena furnished by the Division of Tax Appeals, therefore, there is no issue to be addressed regarding Mr. Zumbolo's failure to appear. The Division had no obligation to provide a witness for petitioner to examine.

E. Petitioner's memorandums and other documents are nothing more than a tirade against the unfairness of the tax statutes. Any more discussion of his arguments would provide him with an undeserved forum for these opinions. Moreover, it is patently clear that the positions taken by petitioner in this proceeding are frivolous. The Federal tax statutes which result in a so-called marriage penalty were found to be constitutional almost 20 years ago (*see, Mapes v. United States*, 576 F2d 896), and the New York tax statutes protested by petitioner simply mirror the Federal statutes. Petitioner's claim of one or more deductions for dependents has no basis in fact. Apparently, the deductions were claimed as a form of protest, although petitioner was aware that he had no right to claim such deductions under the tax statutes. This is the second proceeding in which petitioner has made the same meritless claims. To discourage petitioners from wasting the resources of the Division of Tax Appeals as well as the Division of Taxation with frivolous claims, the Tax Appeals Tribunal has the authority to impose a penalty of not more than \$500.00 (Tax Law § 2018; 20 NYCRR 3000.21). A penalty is warranted in this case where petitioner has filed a petition in order to protest what he perceives to be injustices in the taxing system, knowing that there is no basis in the tax statutes for his claims. Accordingly, I am imposing an additional penalty of \$100.00 for each tax year petitioned for a total of \$200.00, to be collected and distributed in the same manner as the tax assessed in the notices of deficiency for 1995 and 1997.

F. The petition of Douglas C. Brodmerkel is denied, the notices of deficiency dated April 24, 2000 and June 5, 2000 are sustained, a penalty of \$200.00 is imposed; and in all other respects, the petition is denied.

DATED: Troy, New York  
December 6, 2001

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE